Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	**)**	**CG Docket No. 02-278**
	)	
The Request for a Declaratory	**)**	
	)	
Ruling From Consumer Bankers	**)**	
	)	
Association	**)**	

COMMENTS OF JOE SHIELDS IN REGARDS TO THE PETITION OF CONSUMER BANKERS ASSOCIATION FOR A DECLARATORY RULING ON PREEMPTION OF THE WISCONSIN TELEMARKETING STATUTE

I respectfully submit these comments to the Commission in reply to the Petition for a Declaratory Ruling on Preemption of Wisconsin Statutes and Wisconsin Administrative Code as it relates to interstate telephone calls filed by Consumer Bankers Association (CG Docket No. 02-278, DA 04-3836) with the Commission.

In the June 26th, 2003 adoption of the Commission Report and Order the Commission discussed at length the issue of consistency with State and FTC do not call rules[1]. The Commission concluded that a single national do not call database was the most efficient and least confusing to consumers and telemarketers and that the Commission would work with the states to ensure harmony with the various state do not call data bases and the federal do not call database. Apparently this has occurred as envisioned by the Commission.

Consumer Bankers Association (hereinafter "CBA") is asking the Commission to issue a declaratory ruling on preemption of state law civil actions brought under state law regulating telephone solicitations to telephone numbers on a state do-not-call list in state courts. CBA claims that the Wisconsin state law is "inconsistent" with federal law. Inconsistency is not a legitimate reason for preemption.

As a threshold matter, the constitutional principles of preemption are designed to avoid conflicting regulation commonly referred to as "Conflict Preemption" or Congressional intent to occupy the field commonly referred to as "Field Preemption". Conflict preemption exists when compliance with both federal and state regulations is impossible. Field preemption exists when Congress left no room for States to supplement federal regulation.

In the CBA matter before the Commission there is no basis for preemption as those wanting to make telemarketing calls can easily comply with both the state and federal statute. The Wisconsin law is in harmony with the federal statute and merely places

[1] FCC Report and Order, FCC 03-153A1, Sec. 5, Para. 74-85 and Federal Record Publication: 68 FR 44144-01 Para. 52-63 [2003 WL 21713245 (F.R.)]

additional restrictions on telephone solicitations directed at the forum State of Wisconsin. This is consistent with Congressional intent to create a consumer protection floor (not a ceiling) on telephone solicitations. Furthermore, Congress in passing the Telephone Consumer Protection Act (hereinafter "TCPA") decided not to occupy the field and used language within the statute to specifically permit the States to supplement federal regulation[2]. The Congressional intent together with the language within the TCPA is clear and concise: less restrictive state laws are, with Congressional intent, preempted but a more restrictive state law is not preempted.

Not only can telemarketers easily comply with both state and federal laws, but they must do so if they do not wish to find themselves subject to state long-arm civil and/or criminal actions – Oklahoma law criminalizes the initiation of prerecorded messages to residential and business telephone numbers without prior consent and Texas law criminalizes initiation of telephone solicitations to cell phones and prerecorded messages to residential and business telephone numbers if the initiating device is not registered with the Public Utility Commission[3].

I would also like to point out that a Declaratory Ruling is an inappropriate venue to decide the issue. The FCC should, as is general practice, allow such issues to be decided in adversarial proceedings in the courts. In such court cases, both sides of the issue will be represented by interested parties, where in this action, only the telemarketer position is represented. I trust the Commission will have noted how previous commentors on requests for declaratory rulings on state law preemption have stated "most commentors agree" with State law preemption when most of the commentors are telemarketers! I trust the Commission will also have noticed that many of the commentors[4] are those that initiate computerized telephone solicitations a practice that is "*the scourge of modern civilization*" as the Honorable Senator Hollings aptly described it.

Furthermore, to answer the issues raised by CBA, multiple issues of construction and application of Wisconsin law are critical to preemption analysis. Expertise in Wisconsin law lies best with Wisconsin courts, who should be the ones to decide such questions. Just as federal courts sitting in diversity often defer questions of application and interpretation of state law to the state courts, the FCC should decline to decide this issue at this time, so the issue can be decided first by Wisconsin courts. Such a decision would likely explain and decide the relevant issues of construction and application of state laws so that the FCC will have a more accurate and authoritative basis for application of preemption doctrines to state law. Then and only then, should the FCC review that decision.

Historically states have taken the lead in consumer protection. States are closer to consumer complaints and are able to act quicker in establishing consumer protection laws. Two thirds of the states enacted do-not-call lists well before a federal do-not-call

[2] 47 USC § 227 (f)(6)
[3] One recent pro state law preemption commentor, Soundbite Communications, has after filing comments with the Commission and behind the back of the Commission acquiesced to State law governing the initiation of prerecorded telephone solicitations and has registered its dialing device with the Public Utility Commission of Texas.
[4] Voice Mail Broadcasting Corporation, The Broadcast Team, Soundbite Communications, etc.

list was established. The TCPA is a fifteen year old Federal consumer protection law. Telemarketers now want the Commission to preempt, with this fifteen year old Federal consumer protection law, all state consumer protection telemarketing laws dealing with an existing business relationship exemption.

In this instance CBA is claiming that the Wisconsin law is more restrictive then the federal law on prior business relationship exemption. A prior business relationship exemption should not exist even within the Commissions regulations – a recent survey by the DMA in England provided empirical data that 80% of consumers did not expect or welcome telemarketing calls even when an existing business relationship existed with the caller. This is in direct contrast to those commentors claiming to represent consumer interest. Telemarketers have never represented consumer interests; they represent their interests and their interests only!

The Commission has opened a can of worms with these declaratory rulings on state law preemption similar to the one the Commission opened by commenting in the 1991 TCPA proceeding that an established business relationship exemption existed for facsimile advertisement when the statute contained no such exemption. Telemarketers are broadly hawking their preemption claims and have even created "talking points" guidelines for comment submission to the Commission. It is a massive and blatant conspiracy of the telemarketing industry to neuter all state telemarketing laws similar to the telemarketing industry attempts to neuter the TCPA application to intrastate telemarketing calls prior to the June 26th, 2003 Commission Report and Order. The Commission cannot issue a declaratory ruling to preempt more restrictive state telemarketing laws – it would not be in the best interest of consumer protections. It would only be in the best interests of the telemarketing industry. That is not supported by congressional intent or the statute!

Consequently, I respectfully request that the Commission refrain from issuing a declaratory ruling in the CBA matter until such time as the matter is properly represented and fully presented before the Commission or in the alternative that the Commission deny the CBA petition and declare that as far as consumer interests and privacy protections are concerned more restrictive state laws are not preempted by the TCPA.

Respectfully submitted,

/s/

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